IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C.L. 1994 / W124

BETWEEN	**CARL WYNDHAM**	**CLAIMANT**
AND	**CALVIN TERRILONGE**	**DEFENDANT**
AND	**WINSOME DAVIS-TERRILONGE**	**APPLICANT/ INTERVENER**

Miss Gillian Mullings and Mr. Alando Terrilonge instructed by Messrs. Patrick Bailey & Co. for the Applicant/Intervener
Miss Vanessa Allard instructed by Messrs. Vacciana & Whittingham for the Claimant.
Miss Alicia Thomas for Defendant
Applicant/ Intervener in person
Miss Blondell Wyndham representing the Claimant

Heard: 17th and 27th May 2005

Brooks J.

Mr. Calvin Terrilonge owes Mr. Carl Wyndham well in excess of $3,000,000.00. The debt arises out of a judgment secured by Mr. Wyndham on 27/9/95. Mr. Wyndham, in attempting to secure the fruits of his judgment, obtained in April 2000, an order for the sale of real estate in which Mr. Terrilonge has an interest as a joint tenant.

In March 2005, Mrs. Winsome Davis-Terrilonge, the wife of, and joint tenant with, Mr. Terrilonge, filed the present application to set aside the order for sale. Mr. Wyndham's Counsel, Miss Allard, contends that the order ought not to be set aside because the application does not comply with the relevant rule.

The question that arises is whether this court may properly set aside the order for sale in light of the long delay in making the application.

The order states in part as follows:

1. The Report on Inquiries dated the 9th day of February, 2000 be confirmed.
2. The property comprised in Certificate of Title registered at Volume 962 Folio 13 in the name of the Defendant, Calvin Terrilonge and Winsome Davis be sold by the Plaintiff, either by way of public auction or private treaty.
3. A valuation of the said property be prepared by Allison Pitter & Company.
4. The proceeds of sale of the said property be used to settle:-
   (a) Firstly, all the costs incidental to the sale, including the auctioneer's fees, if any.
   (b) Secondly, half of the net proceeds of sale to be paid to Winsome Davis, joint tenant.
   (c) Thirdly, in settlement of the judgment debt together with interest thereon and costs due to the Plaintiff herein....
6. The Report on Inquiries and this Order be served on all persons who have an interest in the said property as indicated in the Report on Inquiries....

Although the order was made prior to the advent of the Civil Procedure Rules 2002 ('the CPR'), the current application is made pursuant to the CPR and it is in the context of the CPR that it must be assessed.

Rule 55 dealing with orders for sale of land does not contain a provision allowing for applications to discharge such orders; only a person having conduct of the sale may apply to the court to vary directions or to make further directions.

In light of the absence of a specific rule I therefore agree with Miss Allard, that rule 11.18 should be used to assess Mrs. Davis-Terrilonge's application.

Rule 11.18 states as follows:

1) A party who was not present when an order was made may apply to set aside that order.

(2) The application must be made not more than 14 days after the date on which the order was served on the applicant. (emphasis mine)

(3) The application to set aside the order must be supported by evidence on affidavit showing -

(a) a good reason for failing to attend the hearing; and

(b) that it is likely that had the applicant attended some other order might have been made.

From the affidavits presented to the court, the following relevant aspects may be gleaned:

(a) Notice of the application for the approval of the report on enquiries and the order for sale was not properly served on Mrs. Davis-Terrilonge. The notice was mailed by registered post on the 11th April 2000 for a hearing on 13th April 2000.

(b) Mrs. Davis-Terrilonge did not receive the notice prior to the time for hearing or indeed at all as she had previously removed from the premises to which the notice was directed.

(c) The order for sale quoted above, was brought to Mrs. Davis-Terrilonge attention in November 2000 but was not served on her.

(d) A summons for the grant of leave to intervene was filed on her behalf on 14/12/2000. That leave was granted on 4/6/2001.

(e) She did nothing further in respect of the matter until March 2005, after Mr. Wyndham sought a date for a case management conference. Mrs. Davis-Terrilonge essentially blames her previous attorneys –at- law for the failure to apply to set aside the order for sale on a timelier basis.

(f) She claims that she is the sole beneficial owner of the premises.

Miss Allard submits that the facts show that Mrs. Davis-Terrilonge has not complied with rule 11.18 (2). Miss Allard has conceded however that the order for sale was not served on Mrs. Davis-Terrilonge. In light of the non-service I find that there cannot be a time bar to Mrs. Davis-Terrilonge's application as Miss Allard has submitted.

The application must now be considered in the context of rule 11.18 (3).

Reason for failure to attend hearing

I have already noted Mrs. Davis-Terrilonge's explanation for failing to attend the hearing of the summons for the application for the order for sale.

The purported service by registered post was irregular under the provisions of Section 523 of the Judicature (Civil Procedure Code) Law, which required service two clear days before the return date of the summons. This summons was therefore not served in compliance with that requirement and especially so when service was attempted by post, and could not have arrived in 'the normal course of post' within the specified time.

Likelihood of a different order being made if the applicant had attended the hearing of the application for the order for sale.

Miss Mullings asserts that as a joint owner Mrs. Davis-Terrilonge's interest in the property is so thoroughly and intimately bound to that of Mr. Terrilonge, that together they form one person. She concludes by citing the words of Jenkins L.J. in Gill and Anr. V. Lewis and Anr. [1956] 1 All E. R. 844 at p. 848B:

> "It seems to me that the right view must be that in order to obtain an effective judgment for possession against joint tenants judgment must be obtained against both of them. I cannot see that a judgment against one only, both being equally entitled to possession of the whole premises as joint lessees thereof, can have any effect at all."

Miss Mullings submitted that those words are equally applicable to an order for sale as in the present situation. There is a possibility that the learned judge may have been impressed with such a submission and so refused the order for sale.

I was also referred to the case of Royes v. Campbell and Anr. E.349 of 1995 (delivered 16/3/04), where an application for an order for sale was refused in very similar circumstances to the instant case. In Royes, the realty was said to be a private dwelling house.

I am satisfied that had Mrs. Davis-Terrilonge been represented at the hearing on the 13th April 2000 some other order might have been made. It is true that the learned judge was aware that Mr. Terrilonge was only one of two joint tenants. I find however that, in light of her claim to sole beneficial ownership of the realty, the likelihood is that the learned judge would not have ordered that half of the net proceeds of sale be paid to Mrs. Davis-Terrilonge without at least making, or ordering to be made, an enquiry as to the nature of the beneficial interest of each joint tenant.

I therefore find that rule 11.18 does not bar Mrs. Davis-Terrilonge's present application, and that she has satisfied its requirements. Because of her long delay in making the application after she was made aware of the order I shall not award her any costs.

For these reasons, it is ordered as follows:

1. That the order for sale made herein on 13/4/2000 be and is hereby set aside.
2. Each party is to bear its own costs.